

SUPER LAW GROUP, LLC

May 26, 2016

Via Certified Mail, Return Receipt Requested

Flag Container Services, Inc.
11 Ferry Street
Staten Island, New York 10302

Peter Franchini
11 Ferry Street
Staten Island, New York 10302

Ferry Street Enterprises, Inc.
11 Ferry Street
Staten Island, New York 10302

William Formica
11 Ferry Street
Staten Island, New York 10302

Formica Construction, Inc.
11 Ferry Street
Staten Island, New York 10302

Kenneth Formica
11 Ferry Street
Staten Island, New York 10302

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear All,

We are writing on behalf of Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper),¹ ("Baykeeper") to notify you of their intent to file suit against Flag Container Services, Inc., Ferry Street Enterprises, Inc., Formica Construction, Inc., Peter Franchini, Kenneth Formica, and William Formica (collectively, "Flag") pursuant to Section 505(a) of the federal Clean Water Act ("CWA")² for violations of the CWA.

Baykeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.³

Baykeeper intends to take legal action because Flag is discharging polluted stormwater from Flag's material recycling facility at 11 Ferry Street, Staten Island, NY ("the Facility") to the waters of the United States without a permit in violation of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, Flag has not applied for coverage under, nor complied with the

¹ Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), is a non-profit public interest 501(c)(3) corporation, whose mission is to protect, preserve, and restore the ecological integrity and productivity of the Hudson-Raritan Estuary through enforcement, field work and community action. Baykeeper has approximately 350 members in the New York and New Jersey region, many of whom use and enjoy New York Harbor, which is polluted by industrial stormwater runoff discharged by facilities in New York City that are or should be covered by the General Permit and New Jersey that must comply with New Jersey's Basic Industrial Stormwater General Permit.

² 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

conditions of, an individual National Pollutant Discharge Elimination System (“NPDES”) permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity (“General Permit”)⁵ issued by the New York State Department of Environmental Conservation (“DEC”), in violation of Sections 402(p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor, Long Island Sound, and other receiving waters. The consensus among agencies and water quality specialists is that stormwater⁶ pollution accounts for more than half of the total pollution entering the marine environment each year.

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as “impaired,” or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility into the Kill Van Kull. The Kill Van Kull is located between Staten Island and Bayonne, New Jersey and connects Newark Bay to the Upper New York Bay, which is fed by the Hudson and East Rivers and connects to the Lower New York Bay and the Atlantic Ocean. DEC has classified the Kill Van Kull as an “SD” water.⁸ Under New York’s Water Quality Standards, a waterbody that is designated as “SD” shall be suitable for fish, shellfish, and wildlife survival.⁹

The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet

⁵ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter “General Permit”), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited June 23, 2015).

⁸ See 6 N.Y.C.R.R. § 890.

⁹ See 6 N.Y.C.R.R. § 701.14.

these numeric and narrative criteria in order to support its designated uses.¹⁰ The Kill Van Kull consistently fails to meet state water quality standards and illegal stormwater discharges from this Facility contribute to this failure.¹¹ DEC has designated the Kill Van Kull as impaired pursuant to Section 303(d) of the CWA¹² for failure to meet minimum water quality standards for a number of pollutants.¹³ These pollutants include floatables, dioxin, and other toxics including mercury and other heavy metals.¹⁴ DEC also indicates that “Urban Stormwater Runoff,” which includes the Facility’s illegal stormwater discharges, contributes significantly to the Kill Van Kull’s impaired status.¹⁵

While the Kill Van Kull is one of the most heavily traveled water ways on the east coast, its water quality should not be sacrificed to pollutants from industrial activity. Various levels of the government are making significant efforts to improve the Kill Van Kull’s water quality. For instance, in 2010, the New York City Department of Environmental Protection activated a new throttling gate at Staten Island’s Port Richmond Wastewater Treatment Plant allowing excess stormwater and sewage to be stored in existing sewer lines rather than discharging directly into the Kill Van Kull.¹⁶ And the States of New York and New Jersey have been working together with the U.S. Environmental Protection Agency (“EPA”) for some time on plans to restore water quality throughout the New York Harbor under the Clean Water Act. It is time for Flag to join fully in this effort to restore the biological integrity of the Kill Van Kull. At a minimum, Flag must stop illegally discharging polluted stormwater and other effluents.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. Flag Is Discharging Stormwater Associated with Industrial Activity to Waters of the United States Without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁷ Flag’s industrial activity at the Facility has caused and continues to cause a “discharge of pollutants” within the meaning of Section 502(12) of the CWA¹⁸ and a “stormwater discharge associated with industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on at least each and every day that there has been a

¹⁰ See 6 N.Y.C.R.R. §§ 702, 703.

¹¹ See NY DEC, *Final 2014 New York State Section 303(d) List* (June 2014), available at: http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf.

¹² 33 U.S.C. § 1313(d).

¹³ *Id.* at 9.

¹⁴ 303(d) List at 9, 25, and fn 68.

¹⁵ 303(d) List at 9.

¹⁶ Press Release, NYC Department of Environmental Protection, DEP Completes Project to Improve Water Quality in Kill Van Kull (May 19, 2010), available at http://www.nyc.gov/html/dep/html/press_releases/10-51pr.shtml#.VYHVZIVViko.

¹⁷ See CWA §§ 301(a), 402.

¹⁸ 33 U.S.C. § 1362(12).

rain event of more than 0.1 inches.¹⁹ The Facility has exposed and continues to expose industrial pollutants to stormwater, at a minimum, by (a) receiving, storing, and processing solid waste, including construction related waste materials outside or otherwise exposing them to the elements and (b) from vehicles entering and leaving the Facility that track pollutants off site. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are carried away from the Facility in stormwater discharges.

Specifically, Flag's waterfront activities at the Facility include but are not limited to the purchase, collection, processing, and outdoor storage and construction and demolition debris, including scrap metal and rubble, as well as operating a waste transfer station. Notably, Peter Franchini and Flag Container Services, Inc. hold a construction and demolition debris processing permit issued by DEC that specifically contemplates the processing and recycling of materials including concrete, wood, pallets and crates, paper/cardboard, plastics, aluminum and other metals, and waste tires. Baykeeper believes the Facility houses waste materials including: industrial scrap steel and non-ferrous materials (including but not limited to aluminum, copper, brass, stainless steel, bronze, zinc and various alloys); remnants of interior demolitions (including plaster, sheet rock, cement, scrap wood and plywood, and other miscellaneous debris); plastics; and a variety of contaminants found in waste streams ranging from solvents and acids to petroleum, paint chips and other surface coatings, and fine particulates.

These activities involve not only waste materials, but also operation and storage of industrial equipment vehicles. Much of this activity is conducted outdoors. Trucks and other vehicles driving on and off the property are also point sources of pollution. Besides the wastes stored on site, vehicles and industrial equipment at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

In addition, machinery on the site may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residue. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows.

Because Flag fails to adequately fence, shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Stormwater picks up sediment, oil, grease, metals, paints, plastic, solvents, nutrients, pathogens, particulates, dust, and other solids that can dissolve or suspend in stormwater, and other trash and pollutants associated with the Facility's operations. Stormwater, objects, and debris are then conveyed off-site and into waters of the United States. Further, vehicles at the Facility track dust, particulate matter, and other contaminants to areas on and off the premises from which these pollutants can enter stormwater and, ultimately, waters of the United States.

¹⁹ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. *See, e.g.*, 40 C.F.R. § 122.26(c)(1)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

Polluted stormwater discharges flow from the Facility into the Kill Van Kull, which is a “water of the United States,” as defined in 40 C.F.R. § 122.2 and, therefore, a “navigable water” as defined in Section 502(7) of the CWA. Flag does not have a NPDES permit for these discharges of pollutants. Thus, Flag is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. Flag is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

Flag collects and processes construction and demolition debris, and other scrap materials. Flag has registered the Facility with the State of New York as a solid waste management facility. Accordingly, Flag operates a “material recycling facility” as defined in the General Permit and is an industrial discharger engaged in scrap and waste material processing, which is an industrial activity included in sector N of the General Permit.

Pursuant to Section 402(p) of the CWA and regulations promulgated by EPA pursuant to the CWA, Flag must apply for coverage under the General Permit or an individual NPDES permit for Flag’s discharge of polluted stormwater. In addition, Flag must apply for an individual NPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit. By failing to apply for coverage under the General Permit or an individual permit, Flag is violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).²⁰

To be eligible to discharge under the General Permit, Flag must submit to DEC a registration form called a “Notice of Intent.”²¹ Notice of Intent forms are available online from DEC.²² To register, Flag is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about

²⁰ Sections 301(a) and 402(a) and (p) make it unlawful for Flag to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. Sections 122.26(c)(1) and (e)(1) require Flag to apply for a NPDES permit that covers Flag’s discharge of stormwater associated with industrial activity.

²¹ See General Permit, Part I.E.3. In notifying Flag that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Baykeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

²² See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

whether the receiving waters are impaired.²³ Flag has failed to prepare and file a Notice of Intent or an application for an individual permit.²⁴

C. Flag is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, Flag must comply at all times with the requirements of the General Permit (or an individual permit).²⁵ By discharging stormwater associated with industrial activity without complying with the General Permit, Flag is violating CWA Sections 301(a) and 402(a) and (p).²⁶ The main General Permit requirements that Flag has failed and continues to fail to meet are explained further below.

1. Flag has not developed and implemented a Stormwater Pollution Prevention Plan.

Before submitting a Notice of Intent, Flag must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.²⁷ The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²⁸

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.²⁹ Flag has not developed and implemented a legally compliant SWPPP, as required by Part III of the General Permit.³⁰

2. Flag has not implemented control measures and Best Management Practices that meet the best available technology standards.

²³ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at: http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²⁴ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

²⁵ This section discusses the compliance requirements of the General Permit. If Flag elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus Flag will still be required to comply with all of the following.

²⁶ Sections 301(a) and 402(a) and (p) make it unlawful for Flag to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

²⁷ See General Permit Part III.B.

²⁸ See General Permit Part III.A.

²⁹ See General Permit Part III.C.

³⁰ Notifier believes no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

Flag cannot legally discharge stormwater under the General Permit until it implements mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.³¹ The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that “[t]he owner or operator must select, design, install, and implement control measures (including best management practices),” in accordance with good engineering practices, to meet the effluent limits contained in the permit.³² The General Permit’s effluent limits include both numeric limits specific to certain sectors,³³ as well as non-numeric technology-based effluent limits that apply to all facilities.³⁴ These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater³⁵ and minimizing the discharge of pollutants in stormwater³⁶ “to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”³⁷

Flag has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. Flag has not conducted routine site inspections and complied with monitoring, recordkeeping, and reporting requirements.

Flag must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.³⁸ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.³⁹ Records of this inspection must be kept for five years.⁴⁰

In addition, qualified facility personnel must carry out routine inspections at least quarterly.⁴¹ During these inspections, personnel must evaluate conditions and maintenance needs of

³¹ See General Permit Part I.B.1, see also Part VII (setting forth sector-specific control measures and practices).

³² General Permit Part I.B.1.a; see also Part III.C.7 (“The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.”).

³³ See General Permit, Part VIII.

³⁴ See General Permit, Part I.B.1.a.2.

³⁵ See General Permit, Part I.B.1.a.2.a.

³⁶ See General Permit, Part I.B.1.a.2.f.

³⁷ General Permit, Part I.B.1.

³⁸ See General Permit, Part IV.A.1

³⁹ See General Permit, Part IV.A.1

⁴⁰ See General Permit, Part IV.A.2

⁴¹ See General Permit, Part III.C.7.b.2.

stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.⁴² Such deficiencies must then be addressed through corrective actions.

The General Permit also requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.⁴³ In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;⁴⁴
- conduct visual monitoring of stormwater discharges at least quarterly;⁴⁵
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴⁶
- inspect, sample and monitor discharges from coal pile runoff;⁴⁷
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁴⁸
- document storm events during which any samples are taken;⁴⁹
- document all of these monitoring activities;⁵⁰
- keep records of the monitoring with the Facility's SWPPP;⁵¹ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of any required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁵²

Because Flag engages in industrial activities associated with Sector N, sampling is required for:

- Total Mercury;
- PCBs;
- Total Suspended Solids;
- Total Recoverable Aluminum;
- Total Recoverable Cadmium;
- Total Chromium;
- Total Recoverable Copper;
- Total Recoverable Iron;

⁴² See General Permit, Part III.C.7.b.1 and b.3.

⁴³ See General Permit, Part IV.B.3.

⁴⁴ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

⁴⁵ See General Permit, Part IV.B.1.a.

⁴⁶ See General Permit, Part IV.B.1.b.

⁴⁷ See General Permit, Part IV.B.1.d.

⁴⁸ See General Permit, Part IV.B.1.f.

⁴⁹ See General Permit, Part IV.B.2.c.

⁵⁰ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, *see generally* Part IV.E.

⁵¹ See General Permit, Part IV.E.

⁵² See General Permit, Part IV.B.1 and 2 and Part IV.C.

- Total Recoverable Lead;
- Total Recoverable Zinc;
- Oil & Grease;
- Chemical Oxygen Demand.⁵³

If Flag operates a shredder, it must also sample for the following:

- Benzene;
- Ethylbenzene;
- Toluene; and
- Xylene.⁵⁴

Baykeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁵⁵ This notice provides Flag with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Flag has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. Flag also has failed to retain records and submit monitoring reports to DEC as required by, at least, Parts IV and VIII of the General Permit.

4. Flag has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector N. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement that the SWPPP include a program to control materials received for processing:
 - Notifying suppliers/public which scrap materials will not be accepted at the facility or are only accepted under certain conditions;
 - Develop and implement procedures to inspect inbound shipments of recyclable materials;
 - Develop and distribute educational material targeting the public and/or commercial drivers of inbound vehicles; and
 - Training targeted for personnel engaged in the inspection and acceptance of inbound recyclable materials.

⁵³ See General Permit, Part VIII, Sector N.

⁵⁴ See *Id.*

⁵⁵ See General Permit, Part VIII.

- A requirement that the SWPPP address BMPs to minimize contact of particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Good housekeeping measures, including frequent sweeping of haul and access roads and the use of dry absorbent or wet vacuum clean up methods, to contain or dispose/recycle residual liquids originating from recyclable containers; and
 - Good housekeeping measures to prevent the accumulation of particulate matter and fluids, particularly in high traffic areas.
- A requirement that the SWPPP describe BMPs to minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Store the equivalent one day's volume of recyclable materials indoors;
 - Containment of diversion structures such as dikes, berms, culverts, trenches, elevated concrete pads, and grading installed where appropriate to minimize contact of stormwater runoff with outdoor processing equipment or stored materials;
 - Diversion of runoff away from storage areas via dikes, berms, containment trenches, culverts and surface grading;
 - Cover containment bins, dumpsters, roll off boxes;
 - Permanent or semi permanent covers over areas where materials are transferred, stored or stockpiled;
 - Install a sump/pump with each containment pit, and discharge collected fluids to a sanitary sewer system; and
 - Sediment traps, vegetated swales and strips, catch basin filters and sand filters to facilitate settling or filtering of sediments.
- A requirement that the SWPPP address BMPs to minimize contact of residual liquids and particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document consideration of the following BMPs (or their equivalents):
 - Prohibit the practice of allowing washwater from tipping floors or other processing areas from discharging to the storm sewer system;
 - Disconnect or seal off all floor drains connected to the storm sewer system;
 - Drums containing liquids, especially oil and lubricants, should be stored: indoors; in a bermed area; in overpack containers or spill pallets; or in similar containment devices;
 - Drip pans or equivalent measures shall be placed under any leaking piece of stationary equipment until the leak is repaired. The drip pans shall be inspected for leaks and potential overflows and all liquids properly disposed of in accordance with RCRA requirements; and
 - Liquid wastes, including used oil, shall be stored in materially compatible and non leaking containers, and be disposed or recycled in accordance with all requirements under the RCRA, and State or local requirements.

Flag's activities are included in the definition of industrial activity to which the CWA applies. Therefore, Flag must obtain coverage under and comply with the requirements of the General Permit, including those specific to Flag's industrial activities, as described in Part VIII and outlined above. Flag has failed to obtain coverage under the General Permit and comply with these additional requirements.

6. MV Transportation is Discharging a Pollutant of Concern to Impaired Waters

Discharges to an impaired waterbody listed on New York's 303(d) list are not eligible for coverage under the General Permit if the cause of impairment is a pollutant of concern included in the benchmarks and/or effluent limitations to which the facility is subject unless the facility:

- Prevents all exposure to stormwater of the pollutant(s) for which the waterbody is impaired,
- Documents that the pollutant for which the waterbody is impaired is not present onsite, or
- Provides additional information in the SWPPP to minimize the pollutant of concern causing the impairment as specified in Part III.F.4.⁵⁶

The Kill Van Kull is an impaired waterbody listed on New York's 303(d) list. Its impairment is caused by PCBs, other toxics, and floatables.⁵⁷ PCBs and other toxics including Mercury, Lead, Cadmium, and Chromium are included in the benchmark monitoring requirements to which the Staten Island Facility is subject. Flag has not prevented all exposure to those toxics, nor has it documented that they are not present onsite. Flag has not submitted a SWPPP with the additional information specified in Part III.F.4 of the General Permit.

In addition, because the Kill van Kull is impaired by pollutants of concern included in the benchmarks and/or effluent limitations to which the Staten Island Facility is subject, Flag is required to collect and analyze stormwater samples for each outfall for the impairing pollutants quarterly.⁵⁸ Flag has failed to comply with this requirement.

5. Flag is clearly violating the Clean Water Act.

In sum, Flag's discharge of stormwater associated with industrial activities without a permit, Flag's failure to apply for permit coverage, and Flag's failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

⁵⁶ See General Permit Part II.C.1.

⁵⁷ 303(d) List at 9 & 25.

⁵⁸ See General Permit, Part IV.B.1.g.

Flag Container Services, Inc., Ferry Street Enterprises, Inc., Formica Construction, Inc., Peter Franchini, Kenneth Formica, and William Formica (grouped above as “Flag”) are the persons, as defined by Section 502(5) of the CWA, responsible for the violations alleged in this Notice. Flag has operational control over the day-to-day industrial activities at this Facility. Therefore, Flag is responsible for managing stormwater at the Facility in compliance with the CWA. Baykeeper hereby puts Flag on notice that if Baykeeper subsequently identifies additional persons as also being responsible for the violations set forth above, Baykeeper intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 11 Ferry Street, Staten Island, NY. To avoid all doubt, the Facility can also be identified by its Block and Lot numbers as designated by the City of New York: Richmond County, Block 1068, Lot 45. The waterfront edge of the Facility runs along and discharges directly into the Kill Van Kull overland. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁵⁹

V.

DATES OF VIOLATION

Every day upon which Flag has failed to apply for permit coverage since Flag first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Section 301(a) of the CWA and EPA’s regulations implementing the CWA.⁶⁰ These days of violation have continued consecutively since Flag commenced operation at the Facility.

Additionally, Flag has discharged pollution without a permit in violation of Section 301(a) of the CWA on every day since Flag commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if Flag seeks permit coverage after receiving this letter but fail to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Flag claims

⁵⁹ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. See, e.g., *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), aff’d 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995)

⁶⁰ See also 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

coverage under a NPDES permit but fail to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

Flag is liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available to Baykeeper after the date of this Notice of Intent to File Suit.⁶¹ These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

Baykeeper will ask the court to order Flag to comply with the Clean Water Act, to pay penalties, and to pay Baykeeper's costs and legal fees.

First, Baykeeper will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d) and such other relief as permitted by law. Baykeeper will seek an order from the Court requiring Flag to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁶² each separate violation of the CWA subjects Flag to a penalty not to exceed \$37,500 per day for each violation that occurred after January 12, 2009.⁶³ Baykeeper will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, Baykeeper will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

⁶¹ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.")

⁶² 33 U.S.C. § 1319(d); see also 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁶³ 40 C.F.R. § 19.2.

Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper)
52 West Front Street
Keyport, NJ 07735
(732) 888-9870
Attn.: Debbie Mans, Executive Director

VIII.

IDENTIFICATION OF COUNSEL

Baykeeper is represented by legal counsel in this matter. The name, address, and telephone number of Baykeeper's attorneys are:

Edan Rotenberg
Nicholas W. Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit Flag to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁶⁴

If Flag has developed a SWPPP, Baykeeper requests that Flag send a copy to the undersigned attorney.⁶⁵ Otherwise, Baykeeper encourages Flag to begin developing a SWPPP immediately after receiving this letter and ask that Flag please inform the undersigned attorney of Flag's efforts so that Baykeeper can work with Flag to avoid disputes over the contents of the SWPPP.⁶⁶

⁶⁴ 40 C.F.R. § 135.3(a).

⁶⁵ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁶⁶ Baykeeper will not send a new notice letter in response to any effort Flag makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997

During the sixty-day notice period, Baykeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If Flag wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,



Edan Rotenberg, Esq.
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

cc:

Gina McCarthy, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Judith A. Enck, EPA Region 2 Administrator
Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Basil Seggos, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

(9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

